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# Resolving Islamic Finance Disputes Through International Commercial Arbitration in the Gulf Region

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## **Resolving Islamic Finance Disputes through International Commercial Arbitration in the Gulf Region**

### **I. INTRODUCTION**

Middle Eastern countries have experienced considerable economic growth and wealth accumulation in recent years. The influx of wealth from the export of oil and natural gas resources has sparked further development of large scale infrastructure, healthcare, education, and additional business activity.<sup>1</sup> In this same time frame, Islamic finance has grown in popularity. Islamic finance includes a wide range of Sharia-compliant products, including debt-like financing, profit-and-loss sharing, and services similar to money market transactions.<sup>2</sup> Just as with conventional financing arrangements, these products and transactions can be very complex and often involve entities from around the world.<sup>3</sup> In addition to the normal risk allocation considerations of a financial transaction, Sharia-compliant financial arrangements have an added risk that the transaction will be not be considered Sharia-compliant and consequently nullified in the event that a party breaches the contract.<sup>4</sup> When disputes arise, these parties have historically sought relief through litigation, often

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<sup>1</sup> Tim Callen, et al., *Economic Diversification in the GCC: Past, Present, and Future*, International Monetary Fund Staff Discussion Note (December 2014) at 4, available at <https://www.imf.org/external/pubs/ft/sdn/2014/sdn1412.pdf>.

<sup>2</sup> *Id.* at 9.

<sup>3</sup> Jonathan Lawrence, *Resolving Islamic Finance Disputes Through International Arbitration*, Islamic Finance News (October 9, 2013) at 24, available at

<https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=3&cad=rja&uact=8&ved=0ahUKEwidubD859bKAhXEcj4KHQG2Ck0QFggpMAI&url=http%3A%2F%2Fwww.klgates.com%2Ffiles%2Fpublication%2F7ecc54f4-7ee5-41a5-91fa-1bb61cd95502%2FPresentation%2FPublicationAttachment%2F517a260b-1c68-40e3-922d-20969bed68f1%2Fv10i40.pdf&usg=AFQjCNEFXqZFNqowM59t12rYb1DbOk-rjQ&sig2=-3BeEMSeVK7kIRFs3Mt1Gw&bvm=bv.113034660,d.cWw>.

<sup>4</sup> Sarah Walker & Tom Childs, *Arbitration of Islamic Finance Disputes*, Islamic Finance News (January 2015), available at [https://www.google.com/search?q=Sarah+Walker+%26+Tom+Childs%2C+Arbitration+of+Islamic+Finance+Disputes%2C+Islamic+Finance+News+\(January+2015\)&oq=Sarah+Walker+%26+Tom+Childs%2C+Arbitration+of+Isla](https://www.google.com/search?q=Sarah+Walker+%26+Tom+Childs%2C+Arbitration+of+Islamic+Finance+Disputes%2C+Islamic+Finance+News+(January+2015)&oq=Sarah+Walker+%26+Tom+Childs%2C+Arbitration+of+Isla)

in neutral, foreign venues such as England or the United States.<sup>5</sup> Arbitration has grown in popularity for parties engaging in transactions in the conventional financial sector. Legal scholars have also advocated the use of arbitration in the Islamic finance sector because the quick and amicable means of dispute resolution through arbitration aligns more closely with the spirit of Sharia Law than traditional litigation.<sup>6</sup> A number of international arbitration forums in the Gulf States are now available to hear Islamic finance-related disputes.<sup>7</sup> These forums can offer Islamic finance experts as arbitrators and have developed particular procedural rules and features that may appeal to different types of Islamic finance participants.<sup>8</sup> Along with these forums, many international law firms have opened offices in the area and developed expertise in Islamic finance in banking, project finance, capital markets, restructuring, and mergers and acquisitions.<sup>9</sup> These firms can similarly draw on their arbitration knowledge as well as their Islamic finance experience to better advise clients and allocate risk effectively in the increasingly complex cross-border transactions that have Islamic finance components.

When considering whether or not to include an arbitration clause in a contract, parties are likely to have two questions: (1) which forum will provide the best opportunity for an efficient and just resolution, and (2) will I be able to enforce a judgment in the intended jurisdiction? This paper provides an overview of the alternative forums available to resolve financial disputes in Bahrain, Qatar, and the United Arab Emirates and provides a set of guidelines parties may want to consider when drafting an arbitration provisions for an Islamic finance contract.

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mic+Finance+Disputes%2C+Islamic+Finance+News+(January+2015)&aqs=chrome..69i57.715j0j7&sourceid=chrome&es\_sm=93&ie=UTF-8.

<sup>5</sup> Aida Maita, *Arbitration of Islamic Financial Disputes*, 20 Ann. Surv. Int'l & Comp. L. 35, 36 (2014).

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 35–36.

<sup>8</sup> See Section III, *infra*.

<sup>9</sup> Maita, *supra* note 5, at 70.

This paper will proceed as follows: Section II will provide a brief overview of Islamic finance and discuss some of the structures commonly used in these transactions. Section III will discuss the different dispute resolution centers in Bahrain, Qatar, and Dubai and explain how these forums interact with the greater international legal framework. Section IV discusses the tradeoffs between arbitration and litigation for these types of disputes. Section V discusses what factors investors and issuers should consider when drafting an arbitration provision for inclusion in an Islamic finance contract. Section VI concludes.

## II. BACKGROUND ON ISLAMIC FINANCE

Islamic finance is defined as a set of financial activities conducted in accordance with Sharia Law.<sup>10</sup> In order to comply with Sharia law, Riba (interest) and Gharar (excessive speculation in contract) are prohibited.<sup>11</sup> As a result, Sharia-compliant financial instruments prohibit debt obligations with interest payments, focus on profit and loss sharing rather than fixed liabilities, are backed by real assets rather than more abstract or speculative interests, and emphasize ethics and fair dealing over pure profit maximization.<sup>12</sup> The Islamic finance industry is sizable and has grown beyond Muslim and Middle Eastern countries. Over \$2 trillion in assets are managed in a Sharia-compliant manner and even the UK government and GE Capital have raised funds through sukuk, which can be thought of as Islamic bonds.<sup>13</sup>

Scholars and financiers have engineered a range of financial products that comport with these principles of Islamic law while simultaneously facilitating capital formation to finance various activities. Common products include:

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<sup>10</sup> Maita, *supra* note 5, at 37.

<sup>11</sup> *Id.*

<sup>12</sup> *See id.*

<sup>13</sup> Walker & Childs, *supra* note 4, at 1.

- Ijara—lease;
- Murabahah—sales with a mark-up and deferred payments;
- Sukuk—investment trust certificates;
- Takaful—a mutual form of insurance;
- Wakalah—agency contracts that are often used for money market transactions.<sup>14</sup>

Islamic finance also often includes certain forms of microfinance.<sup>15</sup>

Islamic finance presents unique risks and opportunities for investors, users, and these economies as a whole. Islamic finance is arguably less prone to crisis because the profit-and-loss sharing features encourage better risk management by financial institutions and less overall leverage.<sup>16</sup> Islamic finance is also heralded for being more ethical and Islamic financial institutions are well-placed to support economic development and increase access to capital for underserved populations.<sup>17</sup> At the same time, however, Sharia-compliant financial products carry an embedded risk that a customer could claim the agreement does not comply with Sharia and claim the contract is void.<sup>18</sup> This risk is further complicated by the fact that these financial products often have cross-border components while international coordination on regulations has not yet converged.<sup>19</sup>

Standard-setting organizations for Islamic finance have emerged. These include Accounting and Auditing Organization for Islamic Financial Institutions (AAOIFI), the International Islamic Financial Market (IIFM), the International Islamic Rating Agency (IIRA), and the Islamic Financial

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<sup>14</sup> IMF at 9 – 10. *See also* Latham & Watkins, *The Sukuk Handbook: A Guide to Structuring Sukuk*, 1.

<sup>15</sup> For example, the Family Bank of Bahrain engages in microfinance as an Islamic bank. *See Our Profile*, Family Bank, [http://www.familybankbh.com/fb\\_profile.asp](http://www.familybankbh.com/fb_profile.asp).

<sup>16</sup> Alfred Kammer et al., *Islamic Finance: Opportunities, Challenges, and Policy Options*, International Monetary Fund (April 2015), 8, *available at*

<https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKEwiQrLjH69bKAhUCCT4KHUCdB5AQFgggMAA&url=https%3A%2F%2Fwww.imf.org%2Fexternal%2Fpubs%2Fft%2Fsdn%2F2015%2Fsdn1505.pdf&usq=AFQjCNG1eymjlg09qh0V2O6xizkG5UkKhg&sig2=sDjudTqPNaav4u4I24rhjA>.

<sup>17</sup> *Id.*

<sup>18</sup> Walker & Childs, *supra* note 4, at 1.

<sup>19</sup> *Id.*

Services Board (IFSB).<sup>20</sup> AAOIFI is working to codify Sharia standards that can be used to regulate specific Islamic finance transactions and provide best practices for parties to consult as well.<sup>21</sup>

AAOIFI's current standards have been adopted by countries in the Middle East, including the Kingdom of Bahrain, the Dubai International Financial Center, Jordan, Lebanon, Qatar, Sudan, and Syria, while additional countries have issued guidelines based on the AAOIFI standards.<sup>22</sup> However, because many Middle Eastern countries lack separate Islamic finance legislation, these standards have not had a meaningful impact on Islamic finance in these jurisdictions.<sup>23</sup>

### **III. INTERNATIONAL COMMERCIAL ARBITRATION**

#### **A. Enforceability of Foreign Judgments**

Although there are clear benefits to pursuing dispute resolution through international commercial arbitration rather than through litigation, these benefits can only be realized if an eventual arbitral award is considered final and binding to the parties. Thus, a number of treaties have been enacted to ensure that these arbitral awards are enforced.

The first is the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Commonly referred to as the New York Convention, this treaty seeks to ensure that foreign arbitration agreements and awards are recognized and enforced by courts in a particular jurisdiction through legislation.<sup>24</sup> Under the New York Convention, courts may refuse to

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<sup>20</sup> Maita, *supra* note 5, at 48.

<sup>21</sup> *Id.* at 49.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> Jonathan Lawrence, Peter Morton & Hussain Khan, *Dispute Resolution in Islamic Finance*, Global Islamic Finance Report 2012 (April 2012), 4, *available at* [https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKEwiv3-SMmeHKAhUDRyYKHcT1DskQFggdMAA&url=http%3A%2F%2Fwww.klgates.com%2Ffiles%2FPublication%2F0b2f56b0-d738-4217-85ee-6670f2101659%2FPresentation%2FPublicationAttachment%2F3e2c3cd0-43fd-4ef4-ac96-700e33340e6a%2FDispute\\_Resolution\\_in\\_Islamic\\_Finance.pdf&usq=AFQjCNHE47dzPTYTonmAWDjt9t6mc\\_MN5A&sig2=LkLlis3HqVC8V\\_j66S59xg](https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKEwiv3-SMmeHKAhUDRyYKHcT1DskQFggdMAA&url=http%3A%2F%2Fwww.klgates.com%2Ffiles%2FPublication%2F0b2f56b0-d738-4217-85ee-6670f2101659%2FPresentation%2FPublicationAttachment%2F3e2c3cd0-43fd-4ef4-ac96-700e33340e6a%2FDispute_Resolution_in_Islamic_Finance.pdf&usq=AFQjCNHE47dzPTYTonmAWDjt9t6mc_MN5A&sig2=LkLlis3HqVC8V_j66S59xg).

recognize an arbitral award in very limited circumstances: the award must either be invalid under the governing law of the country in which the parties are seeking enforcement, the arbitral award is against public policy, or there has been a deficiency in procedure.<sup>25</sup> Assuming that the parties have agreed that an arbitral award is final, courts in any country that has acceded to the New York Convention are not allowed to simply invalidate an arbitral award in order to review the matter on the merits.<sup>26</sup> Although the New York Convention provides greater certainty for parties seeking to enforce an arbitral award, the local courts still have considerable discretion in invalidating an award on procedural or public policy grounds. Bahrain, Qatar, and the United Arab Emirates have all acceded to the New York Convention in recent years: Bahrain in 1988,<sup>27</sup> Qatar in 2002,<sup>28</sup> and the United Arab Emirates in 2006.<sup>29</sup>

Similar standards apply for parties seeking to enforce a foreign court's judgment. The Gulf Cooperation Council (GCC) has enacted the GCC Convention for the Enforcement of Judgments and Judicial Notices and Delegations. The United Arab Emirates, Saudi Arabia, Qatar, Bahrain, Kuwait, and Oman are all members of the GCC.<sup>30</sup> The GCC convention ensures that member states will enforce the foreign judgments from courts in other member states.<sup>31</sup> However, courts are authorized to reject these judgments if the result is contrary to Sharia law, the member state's constitution, or public policy considerations, which preserves a certain amount of discretion for the courts enforcing the foreign judgment.<sup>32</sup>

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<sup>25</sup> *Id.*

<sup>26</sup> See *Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)*, [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/NYConvention.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html)

<sup>27</sup> *Contracting States*, New York Arbitration Convention, <http://www.newyorkconvention.org/countries>.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> Lawrence, Morton & Khan, *supra* note 24, at 5.

<sup>31</sup> *Doing Business in the United Arab Emirates*, Latham & Watkins, 14.

<sup>32</sup> *Id.*

Not all countries that commonly conduct business with GCC countries have acceded to the New York Convention. However, the Inter Arab Convention on Judicial Co-operation, known as the Riyadh Convention, is another international treaty that ensures enforcement of court judgments and arbitral awards between Arab nations.<sup>33</sup> As long as a judgment or arbitral award has been granted by a competent court of arbitration forum, the signatories agree to enforce the judgment or arbitral award without re-examining the merits of the case.<sup>34</sup>

## **B. Forums in the Gulf Region**

Alternative dispute resolution has grown internationally in part because of the United Nations Commission on International Trade Law (UNCITRAL) Model Law.<sup>35</sup> This Model Law provides standards for arbitral procedures, arbitrator selection process, mechanisms for court intervention, and recognition and enforcement of arbitral awards.<sup>36</sup> UNCITRAL Model Law has either been directly adopted or provided inspiration for many countries' legislation regarding international arbitration.<sup>37</sup> In the Gulf region, Bahrain has been modeled after the UNCITRAL Model Law, while the arbitration laws in the United Arab Emirates, Saudi Arabia, and Qatar are not based on the UNCITRAL Model Law.<sup>38</sup> It is important to note, however, that the QFC and DIFC laws are in fact modeled after UNCITRAL.<sup>39</sup>

Below are some of the most easily-recognized arbitration forums in Bahrain, Qatar, and the United Arab Emirates.

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<sup>33</sup> Mohammed Al-Ghamdi, John Lonsberg, Jonathan Sutcliffe & Sam Eversman, *Saudi Arabia*, The Dispute Resolution Review (Richard Clark, ed. 4th ed. April 2012), available at <http://www.nortonrosefulbright.com/files/us/images/publications/20120401SaudiArabia.pdf>.

<sup>34</sup> *Id.*

<sup>35</sup> See Maita, *supra* note 5, at 61.

<sup>36</sup> Lawrence, Morton & Khan, *supra* note 24, at 4.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 5.

<sup>39</sup> *Id.*

## 1. Bahrain Chamber for Dispute Resolution (BCDR-AAA)

The Bahrain Chamber for Dispute Resolution (BCDR-AAA) was established by the Bahrain Legislative Decree No. (30) of 2009 to provide dispute resolution by law for certain domestic financial disputes and to allow additional parties to opt into its dispute resolution forum if they agree to submit to this jurisdiction through contract.<sup>40</sup> The BCDR-AAA provides local and international businesses who submit to its jurisdiction state-of-the-art facilities and case management mechanisms while allowing them to choose counsel, governing law, and the language that the proceedings will be conducted in.<sup>41</sup> The general rules of the arbitration or mediation are based on the American Arbitration Association's International Dispute Resolution Procedures, which is a benefit to attorneys who are familiar with AAA rules from other forums.<sup>42</sup> Once a case is filed it will be referred to an independent Case Manager that will manage deadlines, arrange meeting times for the exchange of documents and memoranda, ensure that notification processes are followed, and file submissions.<sup>43</sup> When selecting mediators and arbitrators, parties have the discretion to choose their own or seek neutral arbitrators with a specific background or expertise from the AAA roster.<sup>44</sup>

## 2. Dubai International Arbitration Centre (DIAC)

The Dubai International Arbitration Centre (DIAC) is the largest arbitration center in the Middle East.<sup>45</sup> The DIAC is an independent non-profit and was established by the Dubai Chamber of Commerce and Industry in 1994.<sup>46</sup> It typically takes between twelve and eighteen months to

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<sup>40</sup> Bahrain Chamber for Dispute Resolution, *Why BCDR-AAA*, (2016) <http://www.bcdr-aaa.org/en/about-us/why-bcdr-aaa>.

<sup>41</sup> *Id.*

<sup>42</sup> BCDR-AAA, *Features of BCDR-AAA*, (2016), <http://www.bcdr-aaa.org/en/about-us/why-bcdr-aaa/features-of-bcdr-aaa>.

<sup>43</sup> BCDR-AAA, *BCDR-AAA FAQs*, (2016), <http://www.bcdr-aaa.org/en/useful-tools/faqs/bcdr-aaa-faqs>.

<sup>44</sup> *Id.*

<sup>45</sup> Interview with Ritta Saoud and Associates, Dubai International Arbitration Centre, in Dubai, UAE (Dec. 23, 2015) [hereinafter DIAC Interview].

<sup>46</sup> *About DIAC*, Dubai International Arbitration Centre, 2006, <http://www.diac.ae/idias/aboutus/>.

resolve a dispute in this forum.<sup>47</sup> The DIAC follows ICC rules and adopted current version of its rules in 2007.<sup>48</sup> The Center keeps a list of qualified experts in various fields.<sup>49</sup>

The DIAC typically hears construction, real estate, oil & gas, and transportation disputes.<sup>50</sup> With the financial crisis, the DIAC noticed an increase in the number of disputes registered—77 cases were registered in 2007 but this number grew to 440 in 2011 and relaxed to 174 in 2014.<sup>51</sup> Approximately half of these cases involve local entities and half of these cases involve foreign entities with local assets, although DIAC personnel noted that there have been cases where both parties were entirely foreign but chose Dubai as a centralized place to meet.<sup>52</sup> In order to ensure that the parties will be able to enforce their DIAC arbitral award in their chosen jurisdiction, the DIAC offers “soft scrutiny” of awards to ensure that the award will comply with relevant procedural requirements.<sup>53</sup>

### **3. Dubai International Financial Center – London Court of International Arbitration (DIFC-LCIA)**

The Dubai International Financial Centre (DIFC) was established by the United Arab Emirates federal constitution, which delegates the emirates the power to set up “free zones” to foster general or industry-specific growth and investment.<sup>54</sup> As a free zone, the DIFC has its own common law court system as well as the DIFC-LCIA Arbitration Centre.<sup>55</sup> In response to concerns over the independence of the DIFC courts and the DIFC arbitration center, these forums were

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<sup>47</sup> DIAC Interview, *supra* note 45.

<sup>48</sup> *DLAC Arbitration Rules 2007*, Dubai International Arbitration Centre, 2006, <http://www.diac.ae/idias/rules/>.

<sup>49</sup> *Why Arbitrate at DLAC?* Dubai International Arbitration Centre, 2006, <http://www.diac.ae/idias/services/diac/advantages/>.

<sup>50</sup> DIAC Interview, *supra* note 45.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Legal Framework*, DIFC Courts (2014), <http://difccourts.ae/legal-framework/>.

<sup>55</sup> *Why DIFC: The Gateway for Capital and Investment*, Dubai International Financial Centre, <http://www.difc.ae/discover-difc>.

restructured to ensure independence.<sup>56</sup> There are currently approximately 30 open arbitration cases in the DIFC-LCIA.<sup>57</sup> The DIFC-LCIA is currently updating its rules, but allows parties to select the seat of the arbitration (with the default being the DIFC).<sup>58</sup> As long as the parties agree to arbitration under the Rules of the DIFC-LCIA Arbitration Centre in writing, they may use the forum to resolve their disputes.<sup>59</sup>

#### **4. International Islamic Centre for Reconciliation and Arbitration (IICRA)**

The International Islamic Centre for Reconciliation and Arbitration (IICRA) is located in Dubai and is “an international, independent, non-profit organization” that provides infrastructure for the Islamic finance industry and can provide dispute resolution services where Sharia law is directly applied.<sup>60</sup> The Center was founded on April 9, 2005 and began activity in January 2007.<sup>61</sup> If the parties agree to submit to arbitration in IICRA, they have the opportunity to choose the venue and choice of law for the arbitration procedures.<sup>62</sup> In compiling an Arbitration Panel, parties have access to IICRA’s lists of jurists, Sharia specialists, economists, professors, and trade specialists.<sup>63</sup>

#### **5. Qatar Financial Centre (QFC) & Qatar International Court Dispute Resolution Centre (QIDRC)**

Qatar has dual legal systems that may be affected by international commercial arbitration. In order to encourage greater foreign investment, the Qatar Financial Centre was established in 2005.<sup>64</sup> In contrast to the DIFC off-shore model, the QFC offers on-shore jurisdiction while only subjecting

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<sup>56</sup> DIFC-LCIA Arbitration Centre, <http://www.difc-lcia.org/>.

<sup>57</sup> *Id.*

<sup>58</sup> DIFC-LCIA Arbitration Rules, adopted February 17, 2008, <http://www.difc-lcia.org/arbitration.aspx>.

<sup>59</sup> *Id.*

<sup>60</sup> IICRA, *Who We Are*, (January 30, 2013), [http://iicra.com/en/misc\\_pages/detail/4c76b6d187](http://iicra.com/en/misc_pages/detail/4c76b6d187).

<sup>61</sup> IICRA, *Establishment*, (January 30, 2013), [http://iicra.com/en/misc\\_pages/detail/4c855d3580](http://iicra.com/en/misc_pages/detail/4c855d3580).

<sup>62</sup> IICRA, *IICRA’s Arbitration Services*, (January 31, 2013), [http://iicra.com/en/misc\\_pages/detail/bf3f4a5019](http://iicra.com/en/misc_pages/detail/bf3f4a5019)

<sup>63</sup> *Id.*

<sup>64</sup> Norton Rose Group, *Arbitration in the Middle East: Qatar*, July 2008, 3, available at <http://www.nortonrosefulbright.com/files/qatar-25751.pdf>.

QFC entities to the specific QFC jurisdiction.<sup>65</sup> The QFC also established a court of first instance to resolve disputes pertaining to QFC entities and has subsequently offered broad jurisdiction for any parties that elect to have their dispute heard by the Qatar International Court Dispute Resolution Centre (QICDRC).<sup>66</sup> The QICDRC offers a common law system with high caliber judges, including the retired Lord Chief Justice of England.<sup>67</sup>

In parallel to the QFC, Qatar ratified the New York Convention in 2002 but has not enacted an arbitration law since 1990.<sup>68</sup> In order for an arbitration agreement to be valid, the parties must make an agreement to resolve the dispute (as well as the scope of the dispute) in writing and obtain the arbitrator's agreement to hear the dispute in writing.<sup>69</sup> An odd number of arbitrators is also required in order for an award to be enforced.<sup>70</sup> The Qatari government also developed the Qatar International Center for Commercial Arbitration in 2006 as a venue for international commercial arbitration.<sup>71</sup>

#### IV. BENEFITS AND CONSIDERATIONS OF RESOLVING DISPUTES

International commercial arbitration offers a number of benefits for parties involved in Islamic finance. Arbitration allows the parties greater flexibility with regard to procedure, it facilitates settlement, it is often more efficient and quicker than traditional litigation, and allows the

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<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> See Steven Finizio & Christopher Howitt, *When International Arbitration Meets Sharia*, Commercial Dispute Resolution (March-April 2013), 51, available at [https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKEwikw6PN0uHKAhVMSSYKHeQpDcgQFggcMAA&url=http%3A%2F%2Fwww.wilmerhale.com%2FuploadedFiles%2FWilmerHale\\_Shared\\_Content%2FFiles%2FEditorial%2FPublication%2Fcdr%2520march-april%2520wilmerhale%2520expert%2520view.pdf&usg=AFQjCNGFRdXG698WijZHCy6JfdnD\\_mAxrQ&sig2=e77\\_6VVu2mCBUJCJCH4IBQ&bvm=bv.113370389,d.eWE](https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKEwikw6PN0uHKAhVMSSYKHeQpDcgQFggcMAA&url=http%3A%2F%2Fwww.wilmerhale.com%2FuploadedFiles%2FWilmerHale_Shared_Content%2FFiles%2FEditorial%2FPublication%2Fcdr%2520march-april%2520wilmerhale%2520expert%2520view.pdf&usg=AFQjCNGFRdXG698WijZHCy6JfdnD_mAxrQ&sig2=e77_6VVu2mCBUJCJCH4IBQ&bvm=bv.113370389,d.eWE).

<sup>68</sup> *Id.* at 51.

<sup>69</sup> Finizio & Howitt, *supra* note 67, at 2.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 1.

parties to select experts in the field or subject-matter of the dispute.<sup>72</sup> Countries in the Gulf region have also ratified the New York Convention, creating greater assurance that international commercial arbitration awards will be enforced in whichever country the claimant seeks to enforce the arbitral award in.

The above reasons are benefits of arbitration, regardless of the particular forum. There are also attributes specific to arbitration in one of the Gulf-based forums mentioned above. Arbitration centers in the Middle East region may be especially well placed to handle Islamic finance disputes because they are familiar with local laws regarding the enforcement of arbitral awards and can ensure that any arbitral awards and decisions comport with all of the procedural and public policy requirements.<sup>73</sup> The DIAC, for example, offers an internal “soft scrutiny” of any awards to ensure that any procedural issues can be corrected before the parties seek to enforce a final award.<sup>74</sup> These forums have also developed recently, and are actively competing with each other to improve infrastructure and institutional expertise and attract more claimants.<sup>75</sup>

In disputes arising over Sharia-compliant financial contracts, arbitration is especially attractive because the parties can agree to arbitrators that have specific experience and expertise with these types of contracts and disputes. These contracts are often governed by New York or English law in cross-border transactions so that there is not a “home court advantage” for either party.<sup>76</sup>

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<sup>72</sup> See Maita, *supra* note 5. For example, Mr. Ahmed Hussain, the CEO of the BRDC-AAA remarked that

We have already seen a shift towards using alternative solutions for dispute resolution in the region due to the considerable advantages that these solutions offer. . . . The process is simple, flexible and cost effective. Furthermore, the parties are able to hand pick an arbitrator or mediator with the credentials and expertise that best suit their needs. This is particularly important when considering the complexities of the Islamic finance industry.

*Id.* at 50.

<sup>73</sup> Maita, *supra* note 5, at 61.

<sup>74</sup> See Section III, *supra*.

<sup>75</sup> Maita, *supra* note 5, at 62–63.

<sup>76</sup> See *id.* at 42.

Generalist judges in these jurisdictions are not familiar with Sharia and lack the institutional competence to opine on Sharia principles.<sup>77</sup> Certain judges may even be unwilling to recognize Sharia law at all, which would frustrate the purpose of the contract.<sup>78</sup> For instance, in *Shamil Bank of Bahrain v. Beximco Pharmaceuticals*,<sup>79</sup> a dispute arose after Beximco entered into a murahaba with the bank and defaulted on the agreement. The contracts had a choice of law clause that stated “Subject to the principles of the Glorious Shari’a, this Agreement shall be governed by and construed in accordance with the laws of England” and the defendants argued that the contract was invalid because it did not comply with Sharia law.<sup>80</sup> Although the court agreed with this argument, it held that these principles could not be applied to invalidate the contract.<sup>81</sup>

There are certain drawbacks to arbitration as well. First, although many countries are signatories to the New York Convention, local courts still have a great deal of discretion and choose to refuse to enforce an arbitral award for failing to meet vague notions of public policy.<sup>82</sup> For example, there was recently a case where a claimant who lost in ICC arbitration that was seated in Paris applied to annul the arbitral award on public policy grounds because it was not made in the name of the Emir of Qatar.<sup>83</sup> The Qatari Court of First Instance annulled the award and this decision was upheld by the Doha Court of Appeal.<sup>84</sup> Even though the Qatar Court of Cassation later overturned the Doha Court of Appeal’s decision, this added additional time and expense to the

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<sup>77</sup> See *id.* at 51.

<sup>78</sup> See, e.g. *Shamil Bank of Bahrain v. Beximco Pharmaceuticals Ltd.*, (2004) 1 Lloyd’s Rep 1 28.

<sup>79</sup> (2004) 1 Lloyd’s Re. 1 28.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> Elena Levi-Tawil, *East Meets West: Introducing Sharia Into the Rules Governing International Arbitrations at the BCDR-AAA*, 12 *Cardozo J. Conflict Resol.* 609, 610 (2011) (“Indeed, many courts in the Middle Eastern countries continue to apply a domestic public policy to the public policy exception to the New York Convention in order to refuse to recognize and enforce foreign arbitral awards.”).

<sup>83</sup> *Qatari Supreme Court Overturns Decision to Set Aside a Foreign Award not in the Name of the Emir*, Allen & Overy, April 17, 2014, available at <http://www.allenoverly.com/publications/en-gb/Pages/Qatari-Supreme-Court-overturms-decision-to-set-aside-a-foreign-award-not-in-the-name-of-the-Emir.aspx>.

<sup>84</sup> *Id.*

arbitration process for the claimant seeking relief.<sup>85</sup> Since Qatar is a civil law system, this decision does not constitute binding precedent to courts of first instance going forward, creating additional uncertainty as to whether future awards could be challenged in the same manner. Similarly, the Dubai Court of Cassation recently confirmed an arbitral award from a DIFC-LCIA proceeding.<sup>86</sup>

Commentators have also noted that historically, institutions have elected to exclude arbitration clauses in their contracts because litigation was thought to carry less legal uncertainty.<sup>87</sup> This translated into lower credit risk for the financial institutions.<sup>88</sup> Both arbitration and litigation impose risks and costs to parties seeking dispute resolution, however, parties to a contract may be able to allocate these risks more effectively by weighing the costs and benefits of arbitration and drafting contractual provisions tailored to their needs.

## **V. FACTORS TO CONSIDER WHEN DRAFTING AN ARBITRATION CLAUSE IN A ISLAMIC FINANCE CONTRACT**

In determining whether to submit to arbitration or litigation, and where, parties should consider: (1) whether they are more likely to sue or be sued; and (2) where an arbitral award or judgment would be certified. Clear answers on these two questions will help entities determine what forum would pose the minimum risk of non-enforcement and provide the most efficient administration of justice during the proceedings.

Once the parties have considered these two questions, there are a number of factors to consider when drafting an arbitration clause in an Islamic finance contract. Specifically, the parties

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<sup>85</sup> *Id.*

<sup>86</sup> Jean-Francois Le Gal & Clementine Letar, *A Positive Trend in the Development of International Arbitration in the UAE? A Few Thoughts After Airmech Dubai LLC v. Macsteel International LLC (Dubai Court of Cassation)* Brown Rudnick, (May 22, 2013), <http://www.brownrudnick.com/news-resources-detail/2013-05-a-positive-trend-in-the-development-of-international-arbitration-in-the-uae--a-few-thoughts-after-airmech-dubai-llc-v-macsteel-international-llc-dubai-court-of-cassation>

<sup>87</sup> Lawrence, Morton & Khan, *supra* note 24.

<sup>88</sup> *Id.*

should consider the governing law of the contract, which arbitral forum to use, the anticipated seat of arbitration, the anticipated jurisdiction of enforcement and whether it is a signatory to the New York Convention.<sup>89</sup> In addition to these global considerations, the parties should also decide what kinds of disputes are covered by the arbitration clause, how many arbitrators they will have and how these arbitrators will be selected, and the language of the proceedings.<sup>90</sup> Depending on the answers to these questions, a particular forum may be more or less attractive. For instance, the parties may want to have access to the lists of expert arbitrators from either the BDRC-AAA or IICRA. Including a boilerplate arbitration clause or failing to consider all of the factors could result in an inefficient allocation of risk.

The likelihood of default may also play a considerable role in determining how the choice of law provision is drafted. Because insolvency proceedings in the Middle East are more costly and take almost twice as long as proceedings in the US, parties may want to protect themselves from the possibility of a local bankruptcy and opt for a New York choice of law provision.<sup>91</sup> Bahrain-based Arcapita Bank, an Islamic investment bank, recently went through US Chapter 11 proceedings in the wake of the global financial crisis and subsequent Arab spring.<sup>92</sup> Through this process, the US bankruptcy court worked with Sharia-compliant contracts and even created an Islamic debtor-in-possession financing arrangement.<sup>93</sup>

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<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> James H.M. Sprayegren, P.C., Kamran S. Bajwa and Brad Weiland, *Arcapita and the Need for Mideast Restructuring Regimes*, The Quarterly Journal of INSOL International (2104) at 19, *available at* [https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKEwi7loPFoN\\_KAhXCeCYKHbSLBcsQFgggMAA&url=http%3A%2F%2Fwww.kirkland.com%2FsiteFiles%2FPublications%2FINSOL%2520World%2520\(Arcapita\\_%2520Sprayegen\)%2520Dec%25202014.pdf&usq=AFQjCNEz2THnR-zdq7A8CWP0KgpR5kh6YQ&sig2=fZKXDUiLAtCKYqTLLpcIRw](https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKEwi7loPFoN_KAhXCeCYKHbSLBcsQFgggMAA&url=http%3A%2F%2Fwww.kirkland.com%2FsiteFiles%2FPublications%2FINSOL%2520World%2520(Arcapita_%2520Sprayegen)%2520Dec%25202014.pdf&usq=AFQjCNEz2THnR-zdq7A8CWP0KgpR5kh6YQ&sig2=fZKXDUiLAtCKYqTLLpcIRw) (citing The World Bank, *Doing Business 2014 Regional Profile: Middle East and North Africa*, MENA 84–90 (2013)).

<sup>92</sup> Chris Johnson, *A Bank, a Bankruptcy and the World of Shariab Law*, American Lawyer, October 2014, *available at* <http://www.gibsondunn.com/news/Documents/Rosenthal-Arcapita-Global-Legal-Awards-Am-Law-10.01.2014.pdf>.

<sup>93</sup> *Id.*

## VI. CONCLUSION

International commercial arbitration can provide parties an efficient and conciliatory means of resolving disputes, making it a preferred alternative over traditional litigation for Islamic finance relationships. Forums located throughout the Gulf region are well placed to hear these disputes because they are centrally located, can provide arbitrators with considerable finance and Sharia-compliance expertise, and are modelled off of model procedural rules. However, many of these forums are in their infancy, and do not have an established track record and body of precedent. In addition, local courts retain considerable discretion to refuse to certify an arbitral award—in the event that a party secures a favorable award through arbitration, it may still have to go through additional litigation in the jurisdiction with the attachable assets to enforce its award. Careful drafting of an arbitration clause can help minimize unintended consequences. This is a rapidly evolving landscape as well; standards for enforcement of awards as well as what constitutes a Sharia-compliant financial product continue to evolve. With current macroeconomic trends, financial disputes are likely to continue to rise—it is all the more important for parties to consider the full ramifications of a particular forum for dispute resolution before submitting to its jurisdiction.